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Supreme Court Of The United States

OCTOBER TERM, 1962

No. 63

BARBARA D. FORD,

Petitioner,

v.

HERMAN A. FORD,

Respondent.

BRIEF OF RESPONDENT

QUESTION PRESENTED

The "Question Involved" stated by Petitioner contains a faulty description of the Virginia order and a faulty paraphrase of what was held by the Supreme Court of South Carolina. Although we doubt the necessity of decision of the point, we restate the Question thus:

Is a "dismissed agreed" order of a Virginia court, entered on the motion of both parties in a custody proceeding, entitled to full faith and credit in the courts of South Carolina in a proceeding in which there is neither allegation nor proof of changed circumstances?

STATEMENT OF THE CASE

Similarly, because Petitioner has repeatedly omitted, minimized, colored, and otherwise altered by argumentative construction the underlying facts of this controversy, it becomes

necessary to restate for the Court the salient facts as disclosed by the record.

Petitioner and Respondent were married in 1952, and three children were born of this marriage. (R. 66-67, 134-135.) Respondent was employed by a tobacco company, and his employment required him to travel frequently. However, as a result of the death in 1957 of a co-employee, who was employed at the Sanford, North Carolina, office of the tobacco company, Respondent and Petitioner established their permanent home in Sanford in January, 1958. (R. 67, 137-138.)

During the first week of July, 1959, while vacationing in Gloucester, Virginia, with her children, Petitioner began an adulterous affair with a married man which is lightly alluded to by Petitioner in her Brief as a "marital difficulty". (R. 70; Pet.'s Brief 3.) This performance in Gloucester, in a trailer near Richmond, and in a motel at Bowling Green, Virginia, continued over a period of about six weeks. (R. 86-93.) Respondent then learned of his wife's infidelity, which she admitted (R. 71, 153-154), and, a few days later, Petitioner and Respondent went to Richmond to discuss the problem with their respective families. (R. 72, 150.) Respondent left Petitioner at her mother's residence in Richmond and on the following day returned to see Petitioner, but he saw only Petitioner's mother. (R. 156-157.) From the conversation Respondent correctly inferred that Petitioner had returned to North Carolina to get the three children. (R. 73-74.) Being apprehensive, Respondent then arranged by telephone for the children to be moved to Fayetteville, North Carolina, in the company of the parties' German maid, where they were promptly joined by Respondent and his mother. (R. 156, 163.) However, Petitioner, accompanied by her sister, discovered the whereabouts of the children in Fayetteville, and the next morning -immediately after Re-

spondent had left for his office in Sanford took the children and drove off with them to Richmond over the protestations of Respondent's mother. (R. 17, 73-74, 96, 163.)

The next day, August 28, 1959, Respondent instituted a habeas corpus proceeding in the Law and Equity Court of the City of Richmond, Virginia, seeking custody of his children, and he alleged in his petition that his wife had "been guilty of acts which were not only of a nature that would justify . . . [his] seeking a divorce from her but which render[ed] her unfit to have the custody of said children." (R. 15-19.) Respondent also alleged that "the best interests of said children would be promoted by them being forthwith returned to the care, custody and control of . . . [Respondent]." (R. 18.)

Petitioner's return to the writ of habeas corpus, filed September 2, 1959, stated that the children were thereby produced, though by stipulation were not physically present, alleged that she was and had been a fit and proper person to have custody of the said infant children and that the writ of habeas corpus had been "issued improvidently and without probable cause." (R. 19-20.) Thereafter, extended negotiations between Petitioner and Respondent, both represented by the Richmond, Virginia, counsel who appear on the briefs in this case, resulted in a detailed agreement between them regarding custody of the three children. This agreement was reduced to writing in the form of correspondence between counsel and was admitted by Petitioner in her testimony in this case in which she endeavors to nullify it. (R. 11-15, 74-75.) Thereafter, *upon motion of counsel for both parties*, the Law and Equity Court of the City of Richmond, on November 18, 1959, under the Virginia practice, entered a "dismissed agreed" order which provided:

"It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed."[1]

By the agreement custody of the children was granted to Respondent except that, during summers and part of the Christmas holidays, custody was granted to Petitioner. (R. 12-15.)

During the next summer and according to the provisions of the agreement, the children were with Petitioner in Greenville, South Carolina, to which she had moved following the break-up of the home. On August 10, 1960, Respondent went to Greenville to inform his children of the death of their grandmother, Respondent's mother. Upon arriving at Petitioner's apartment, Respondent was served with the complaint in this case, whereby Petitioner sought custody of the children. (R. 145-146.) In his answer, Respondent alleged that he was entitled to custody and that Petitioner had thus "violated and breached the agreement made between the parties by and with their respective legal counsel and further violated the Order of the Court of record in Richmond, Virginia that was duly issued and based upon said agreement." (R. 8-9.) Respondent further alleged that Petitioner "was guilty of gross misconduct during the time . . . [Petitioner and Respondent] resided as husband and wife and such gross misconduct included acts of adultery on numerous occasions during July and August, 1959 in Gloucester, Virginia, Chesterfield County, Virginia and a motel at Bowling Green, Virginia with a married man who resides in Richmond, Virginia." (R. 10.)

1. A true copy of this order of dismissal, including the *joint* motion of counsel requesting its entry (which was erroneously omitted in printing the Transcript of Record), may be found *infra*, Appendix A, p. 53.

Petitioner's Brief (p. 8), in "recapitulating the uncontroverted facts and circumstances of this litigation . . .", contains the following statement:

> "the proceeding in South Carolina was instituted when the [P]etitioner and all three children were, and had been for several months, domiciled in Greenville County, South Carolina (R. 76, 143, 144) . . . ."

Also, in Petitioner's Brief (p. 18), it is stated:

> "The children involved herein were domiciled in South Carolina when the proceeding was instituted in the Juvenile and Domestic Relations Court . . . ."

These statements are only two of the argumentative distortions, disguised as fact, with which Petitioner's Brief is replete. The children were not domiciled in South Carolina but were there because Petitioner was living there, and Respondent, with scrupulous regard for the custody agreement, brought them to South Carolina about June 20 to be with her for the summer vacation. (R. 76, 142-144.) By her own testimony Petitioner admitted that Respondent "in every sense of the word . . . was acting as he had agreed to do." (R. 97-98.)

During the hearing in October, 1960, the judge of the Juvenile and Domestic Relations Court stated:

> "both parties are good people, good family, good parents. I am going to exclude any further testimony as to their faithfulness as parents." (R. 118-119.)

However, on December 8, 1960, the judge filed his order in the case which awarded *sole* custody of the children to Petitioner, subject only to "reasonable visitation rights" of Respondent. (R. 28.) The order of the Juvenile and Domestic Relations Court held that the prior "dismissed agreed" order of the Law and Equity Court of the City of Richmond, Virginia, was "a mere order of dismissal." (R. 25.)

Respondent appealed this order to the Court of Common Pleas for Greenville County, South Carolina, which Peti-

tioner says in her Brief (p. 3) "affirmed with minor modifications." This again is less than candid, because after a hearing on January 9, 1961, on the record in the lower court, the Court of Common Pleas on February 25, 1961, awarded custody of the children to Petitioner and Respondent *jointly*. (R. 190.) In effect, the Court of Common Pleas transposed the provisions of the Virginia agreement and awarded custody during the normal school year to Petitioner and custody during the normal holiday months and normal Christmas holidays to Respondent. However, the court stated in its order:

> "I agree with the Judge of the Juvenile and Domestic Relations Court that the custody of these three minor children *may well be left in the hands of either the plaintiff* [Petitioner] *or the defendant* [Respondent]." (R. 187.) (Emphasis added.)

An appeal by Respondent to the Supreme Court of South Carolina resulted in a reversal of the Court of Common Pleas and a reinstatement of the Virginia agreement upon which the "dismissed agreed" order of the Law and Equity Court of the City of Richmond was based. In concluding its opinion, the Supreme Court of South Carolina referred to the Virginia "dismissed agreed" order, stating:

> "Such a judgment of dismissal entered by agreement of the parties, pursuant to a compromise or settlement of the controversy, is a judgment on the merits, barring another action for the same cause and is equivalent to a judgment of retraxit. If the respondent here had instituted in the Courts of Virginia, the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is *res judicata* in that State, it is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the

'dismissed agreed' order or judgment as 'by law or usage' the Courts of Virginia would give to such order or judgment.

* * *

"... We have held that the Court may at any time on the application of any interested party, or even on its own motion, upon sufficient showing, make further disposition of the custody of a child, if new facts and circumstances make it necessary or desirable for the child's welfare. A judicial award of the custody of a child is never final. Ex Parte Atkinson, 238 S.C. 521, 121 S.E. (2d) 4. *Applying this rule to the instant case and after examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action.*

"Since we have reached the conclusion that the 'dismissed agreed' order of the Law and Equity Court of the City of Richmond, Virginia, is a bar to this action between the same parties for the same cause, *in the absence of any allegation or proof of any changed circumstances requiring a change of the custody of the children here involved*, the agreement reached by the parties prior to the order of the Virginia Court is still of full force and effect."[2]

One further development since certiorari was granted herein should be brought to the Court's attention for a full understanding of this case. While this proceeding was pending in the South Carolina courts, Respondent in December 1960 instituted a divorce action against Petitioner in the Superior Court of Lee County, North Carolina, (that being the matrimonial domicile) on the ground of adultery and sought an order of custody of the infant children, who were then residing with him. In May 1962, more than two years having elapsed since the separation of the parties, Respondent filed his amended complaint alleging a second cause of action

2. R. 205-206, 239 S.C. at , 123 S.E. 2d at 39. (Emphasis added.)

for divorce in accordance with the North Carolina statute, to-wit, continuous separation of the parties since August 25, 1959.

Respondent did not ask for trial of his action for divorce and custody, but prior to the May Term 1962 of the Superior Court of Lee County, North Carolina, and while this case was pending in this Court, counsel for Petitioner (the defendant therein) moved the North Carolina court that the case "be ordered calendared and tried at the earliest possible date." Accordingly, that court ordered that "this matter be peremptorily set for trial as the first contested case in Lee County Superior Court for the term beginning August 6, 1962."[3] During the trial Petitioner urged that full faith and credit should be given to the order of the Court of Common Pleas for Greenville County, South Carolina, but the court awarded custody in accordance with the agreement reached in Virginia in 1959 and made the following finding (among others):

> "that upon this hearing on custody this day and upon inquiry by the Court, both parties by counsel disaffirmed any contention of and did not offer to show any change of circumstances of the parties since their agreement and the entry of the 'dismissed agreed' order of the Virginia Court that would justify this Court in making any change in the custody arrangements in said agreement, *which terms of agreement meet with the approval of this Court, and this Court finds that such custodial arrangement is in the best interest of said infant children.*"[4]

All of the foregoing will appear from an exemplified copy of the proceedings in the Superior Court of Lee County, North Carolina, in the cause entitled *H. Aubrey Ford, Jr. v. Barbara Dale Ford;* which is printed and filed with Respond-

3. Appendix A, p. 64.
4. Appendix A, p. 68. (Emphasis added.)

ent's Brief as *Appendix A*. The judgment of the Superior Court in such cause, dated August 9, 1962, was suspended and stayed by an order of the Honorable Emery B. Denny, Chief Justice of the Supreme Court of North Carolina, dated August 24, 1962, pending appeal to that court, and a true copy of such order is printed and filed with Respondent's Brief as *Appendix B*.

Thus, it appears that a uniform result now exists in the three states before whose courts this custody matter has been brought, *i.e.*, Virginia, South Carolina, and North Carolina.

SUMMARY OF ARGUMENT

The policy and requirements of the Full Faith and Credit Clause are equally as strong in the area of child custody as in other areas. The forum should treat a prior custody decree of a sister state with the same respect which would be given it by the courts of the state of its origin, and the forum should modify it only upon such terms as would be required in the state of its origin. Any other rule would lead to chaos and forum-shopping in this sensitive area where the stability of children is such a necessary factor in their welfare. The forum, therefore, should examine the "law or usage" of the courts of the state in which the prior decree originated and should be governed by such "law or usage."

The Supreme Court of South Carolina properly found that the order of dismissal entered by the Law and Equity Court of the City of Richmond, Virginia, was a "dismissed agreed" order under Virginia practice. The parties before the Virginia court, by their joint motion, reported that they had reached agreement settling the issue before the court

(the custody of the children) and asked that the case be dismissed, whereupon the case was dismissed by the court. The Supreme Court of South Carolina also correctly found that such an order of dismissal was *res judicata* of the issue before the Virginia court. Under Virginia practice such an order entered in a child custody case may be modified only upon proof of a subsequent change in circumstances which require a modification in the interest of the child's welfare. No such changed circumstances were alleged or proved in this case. Therefore, the South Carolina court properly refused to change the custody status established by the Virginia order.

However, the constitutional issues argued by Petitioner need not be decided in this case because the Supreme Court of South Carolina demonstrated in its opinion that it did not consider itself finally and forever bound by the Virginia order in its determination of the children's custody. It examined the Virginia proceedings only for the purpose of determining whether the Virginia order had judicially established the children's custody as of the date of its issuance. Finding such to be the case, it then applied *South Carolina law* to determine whether the custody status thus established should be modified, and it held that Petitioner had established no basis for a change or modification under such law. Therefore, the case thus presented to this Court does not raise a substantial federal question under the Full Faith and Credit Clause.

ARGUMENT

A.

THE CUSTODY DECREES OF ONE STATE ARE ENTITLED TO FULL FAITH AND CREDIT IN THE COURTS OF ANOTHER STATE

In her presentation of the "Question Involved", Petitioner assumes argumentatively that the Virginia order was found to "preclude the courts of the State of South Carolina from awarding custody based upon the best interest of the children" (Pet.'s Brief 3); and the same faulty premise is pursued through pages of argument to the conclusion where Petitioner "submit[s] that the South Carolina Court was not required by Article IV, Section I of the Constitution of the United States to grant full faith and credit to the order of the Law and Equity Court of the City of Richmond, Virginia . . . ." (Pet.'s Brief 18.)

In this manner Petitioner strains to raise a constitutional question of substance in order to come within the certiorari jurisdiction of this Court. As will be seen later in this Brief, we respectfully submit that—without doing violence to the Virginia practice and that of other states and without running grave risks which are inherent in the argument of Points I and II of Petitioner's Brief—this is not the case in which this Court will find it necessary to decide the "difficult and important" question of constitutional law upon which this Court has reserved decision in three cases that have been before it in the last fifteen years.[5]

However, if the Court concludes that this is a case in which it becomes necessary to decide the question, then it is respectfully submitted that there can be but one answer in an or-

5. See Kovacs v. Brewer, 356 U.S. 604 (1958); May v. Anderson, 345 U.S. 528 (1953); New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

derly society. The Full Faith and Credit Clause and its implementing statute[6] apply to all "judicial proceedings" of a sister state. Custody proceedings are judicial proceedings.

Broadly stated, the earlier custody decree of a sister state must be accepted by the forum as a determination of the child's custody on the date of the decree. The courts of the various states have developed rules with regard to modifying one of their *own* prior decrees. The universal rule is that inquiry must be limited to facts and circumstances which have developed since the former decree. By all standards, this rule must also be held to apply to decrees of a sister state in accordance with the constitutional mandate.[7]

6. 28 U.S.C. § 1738.

7. See, *e.g.*, Cantrell v. Cantrell, 143 W. Va. 826, 106 S.E. 2d 768 (1958); People *ex rel.* Koelsch v. Rone, 3 Ill. 2d 483, 121 N.E. 2d 738 (1954); Helton v. Crawley, 241 Iowa 296, 41 N.W. 2d 60 (1950); Sutera v. Sutera, 1 A.D. 2d 356, 150 N.Y.S. 2d 448 (1956). In People *ex rel.* Koelsch v. Rone, *supra* at 485, 121 N.E. 2d at 740, the court said:

> "[T]he order of the Massachusetts court, modifying the divorce decree and awarding custody to relator, must be recognized and given full faith and credit by the courts of this State if the Massachusetts court then had jurisdiction over the parties and subject-matter.
>
> "... The requirement of full faith and credit for judgments affecting custody of children depends upon the effect which they are accorded in the State where they were rendered."

In Cantrell v. Cantrell, *supra*, the West Virginia court considered the effect to be given a prior Indiana custody decree entered after "a colloquy between the Judge and the plaintiff's counsel" in a hearing where "no evidence was produced by plaintiff in support of his prayer." The court held that it could not go behind the decree. "It appears to be regular upon its face, and cannot be collaterally attacked in this proceeding." *Id.* at 828, 106 S.E. 2d at 769. The court gave full faith and credit to the Indiana decree, stating that:

> "[S]ince the foreign custody decree is usually regarded as *res judicata* as to conditions as they existed at the time the foreign decree was rendered, only matters that have occurred subsequent to the foreign custody decree can be litigated in the new decision.
>
> "Accordingly, upon a hearing of this matter the trial court should disregard the voluminous allegations of misconduct and unfitness of either of the parents prior to the rendition of the second custodial decree of the Circuit Court of Madison County,

Were more latitude allowed to the courts of the forum than to the courts of the sister state to modify the custody decrees of the latter, an incentive for abduction would exist so long as one parent was dissatisfied. Chaos would ensue, for a prior custody decree would have no more sanctity than custody obtained by stealth, force, fraud, or an order of a court without jurisdiction. Instability would follow, and the courts of more than fifty jurisdictions might be called upon to independently consider the same facts, thereby encouraging "unseemly litigious competition between the states and their respective courts as well as between parents."[8] Thus, as has occurred in the history of litigation between these parties, custody might be awarded to Respondent by a Virginia court into whose jurisdiction Petitioner had clandestinely removed the children; to Petitioner by a South Carolina court[9] in whose jurisdiction the children were temporarily visiting pursuant to the agreement upon which the Virginia order had been founded; and, most recently, to Respondent by a North Carolina court[10] in a divorce action instituted by Respondent in the parties' matrimonial domicile and brought

> Indiana, and *should limit the present inquiry to relevant facts and circumstances which may be shown to have occurred since that time affecting the welfare of the children, and which may or may not justify a change in their custody.*" *Id.* at 836, 106 S.E. 2d at 773. (Emphasis added.)

Petitioner in her Brief (pp. 9-10) has cited two cases as authority for her argument that such an order is not entitled to full faith and credit. Neither of these cases support her. Boone v. Boone, 150 F. 2d 153 (D.C. Cir. 1945), did not involve a consent decree at any stage of litigation, and Petitioner's quotation is pure *dictum*. *Ex parte* White, 49 Cal. App. 2d 160, 121 P. 2d 100 (1942) (referring case to referee), and 54 Cal. App. 2d 637, 129 P. 2d 706 (1942) (confirming referee's report), did not even deal with the decree of a sister state, much less a consent decree.

8. New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 at 620 (1947) (Rutledge, J., concurring).

9. This custody decree was reversed by the Supreme Court of South Carolina whose decision is here before this Court on writ of certiorari.

10. See Appendix A, pp. 65-71.

on for early trial during the pendency of this case before this Court at the insistence of Petitioner.[11]

These conflicts should be removed by a proper application of the Ful Faith and Credit Clause. Petitioner agrees when her desire are thereby served. After raising this constitutional question in her petition for certiorari, and after certiorari was granted, Petitioner urged the Superior Court of Lee County, North Carolina, to give full faith and credit to the decree of the Court of Common Pleas for Greenville County, South Carolina, the decree of the lower court in this case.[12]

Accordingly, in order to avoid the effect of the constitutional mandate—which Petitioner urged the North Carolina court to apply in her favor—attack is now made upon the Virginia order itself. It is contended that it is not an order which the Virginia courts would have treated as *res judicata*, and consequently South Carolina was not required to so treat it. Consideration of the Virginia decisions does not support Petitioner's argument.

B.

THE CUSTODY ORDER OF THE VIRGINIA COURT WAS A "DISMISSED AGREED" ORDER

Petitioner's attempt in Point II of her brief to create doubt that the Virginia order was a "dismissed agreed" order under

11. See Order of Superior Court of Lee County, North Carolina, reprinted Appendix A, p. 64, hereof, wherein the North Carolina case was set for trial on motion of counsel for Barbara Dale Ford on the "earliest possible date."

12. Appendix A, p. 69. This contention by Petitioner, made by her South Carolina counsel within two weeks of filing her Brief in this Court, is diametrically opposed to her argument "that the Full Faith and Credit Clause does not preclude the free exercise of, or interposition of the *parens patriae* jurisdiction of a state . . . ." (Pet.'s Brief 17.)

Virginia practice is pure sophistry. Counsel on her Brief who joined in the motion for the order know its intended import, and in her Brief she admits its nature and effect by conceding that it is an order which the "South Carolina Court may, if it sees fit, recognize as a matter of local law . . ." (Pet.'s Brief 7.)

Petitioner argues, first, that the order merely dismisses the case, "omitting the word 'agreed'." (Pet.'s Brief 14.) The order of the Virginia court belies this argument. It provided:

> "It being represented to the court by counsel that the parties have *agreed* concerning the custody of the infant children, *it is ordered that this case be dismissed.*"[13]

It is apparent from the very language of the order that the parties had "agreed" and upon the agreement Petitioner joined in asking the court to enter the order.

If Petitioner intends to tell the Court that under Virginia law the words "dismissed" and "agreed" must appear in juxtaposition, there is no authority in the Virginia cases for such a proposition. To argue it here is an attempt to exalt form over substance—to make a distinction without a difference. In fact, in the case of *Martin v. Martin*, 167 Va. 206, 188 S.E. 148 (1936), cited and discussed by Petitioner (Pet.'s Brief 14, 15), an order which did not contain the words "dismissed" or "agreed" was held to be a "dismissed agreed" order.

Secondly, Petitioner argues that "it appears from the order that the terms of the agreement were never revealed to the court". (Pet.'s Brief 14.) Nothing of the kind "appears from the order."[14] But in any event, the argument is devoid of legal significance. There is no authority for the proposition that the terms of the agreement must be revealed to the court. All that is required is that the parties *report* to

13. R. 20; Appendix A, p. 53. (Emphasis added.)

14. That it was not, in fact, revealed to the Virginia court was conceded during the hearing in South Carolina. (R. 25.)

the court the fact that they have reached an agreement whereby the controversy has been settled, wherefore the court is asked to dismiss the suit. "Reported" and "revealed" are not synonymous.

In *Hinton v. Norfolk & W. Ry.*, 137 Va. 605, 120 S.E. 135 (1923), the Supreme Court of Appeals of Virginia described a case as having been "dismissed agreed" where

> "Every distinguishing feature of a case 'dismissed agreed' appears, for there is the mutual agreement to terminate the case, which is *reported* to the court, and the consequent motion by the plaintiff to dismiss it."[15]

In the instant case Petitioner has admitted her agreement and its terms (R. 74-75), and upon representation of this agreement and upon motion of *both parties*, the case was dismissed by the Virginia court.[16]

The Supreme Court of South Carolina carefully considered the Virginia order and the authorities. It held this to be a "dismissed agreed" order under the "law or usage in the courts" of Virginia, and its conclusion is amply supported by the authorities; and, as Mr. Justice Douglas said in *Cook v. Cook*, 342 U.S. 126 (1951):

> "the burden of undermining the decree of a sister state 'rests heavily upon the assailant.'"[17]

C.

UNDER THE CIRCUMSTANCES PRESENTED A VIRGINIA COURT WOULD NOT MODIFY THE VIRGINIA ORDER

Under the "law or usage in the courts" of Virginia, a "dismissed agreed" order bars subsequent proceedings between the same parties involving the same issues. This is a cardinal principle in Virginia law, *and none of the cases cited by Peti-*

15. 137 Va. at 609, 120 S.E. at 136. (Emphasis added.)
16. See Appendix A, p. 53.
17. 342 U.S. at 128.

tioner in her brief hold or indicate otherwise.[18]

This rule is nowhere better or more succinctly stated than in *Martin v. Martin*, 167 Va. 206, 211, 188 S.E. 148, 150 (1936), where the Virginia court said:

> "The judgment of a court of competent jurisdiction, dismissing a suit agreed, on the ground that it has been agreed by the parties, is a final determination of the matters which were actually, or might have been litigated in that suit, as against said parties and all claiming under them. *Hoover v. Mitchell*, 25 Gratt. (66 Va.) 387; *Wilcher v. Robertson*, 78 Va. 602; *Wohlford v. Compton*, 79 Va. 333."

But Petitioner insinuates doubt about this rule by stating Pet.'s Brief 12, n. 8):

> "While a number of decisions of the Supreme Court of Appeals of Virginia have discussed 'dismissed agreed' orders, in only four discovered cases has such an order been held to be a bar to a succeeding action. . . . [citing four cases]. Other cases involving or mentioning such orders are: . . . [citing eight cases]."

Petitioner is not candid with the Court. She should also say that in *no* Virginia case involving a valid "dismissed agreed" order has the Supreme Court of Appeals of Virginia *failed* to hold that such an order was a bar to a succeeding action between the same parties involving the same issues.

18. It is also clear under the authority of the most recent Virginia decision relating to the finality of judicial orders that any order of dismissal in Virginia *which does not contain a reservation of right* by the plaintiff to bring another proceeding relating to the same matter, is *res judicata* in that state. In its footnote to Virginia Concrete Co. v. Board of Supervisors, 197 Va. 821, 826, 91 S.E. 2d 115, 119 (1956), the Supreme Court of Appeals of Virginia said:

> "It is well, therefore, to heed the admonition in Lile's Equity Pl. & Pr., 3d ed., § 273, p. 157, that where the plaintiff voluntarily dismisses his suit or when it is dismissed involuntarily for reasons not affecting the merits of the case, *the order should recite that the dismissal is 'without prejudice to plaintiff's right to institute such further suits concerning the same matter as he may be advised,'* in order to avoid a plea of *res judicata* in future litigation." (Emphasis added.)

To avoid the effect of a "dismissed agreed" order in a custody case, Petitioner cites language from *Bardach Iron & Steel Co. v. Tenenbaum*, 136 Va. 163, 118 S.E. 502 (1923) (Pet.'s Brief 15), wherein a "dismissed agreed" order is likened to that of a contract between the parties. But she does not say that the court in that case goes on:

> "It is a contract of record that the court is without power to disturb except as stated. The court may correct its own errors, but cannot change the contracts of parties without their consent. . . . *'It is a declaration of record, sanctioned by the judgment of the court*, that the cause of action has been adjusted by the parties themselves in their own way.' "[19]

Petitioner then cites authority which states that a court can not be bound by a contract between the parties on the question of the custody of children. Pet.'s Brief 16.

The binding effect of a "dismissed agreed" order is more than that of an ordinary contract. "It is a declaration of record, *sanctioned by the judgment of the court*."[20] It is in no sense the type of contract to which the Virginia court refers in the cases cited by Petitioner. Those were not contracts made in settlement of custody issues *then pending before a court of record* as was true here.

When the agreement which formed the basis for the Virginia order was entered into, the Virginia court had the issues before it. It had jurisdiction over the parties and the custody and welfare of the children. It had the power either to grant or to deny the motion for dismissal made by both parties. It had the power to make the agreement *res judicata* or not, as it deemed best. To contend otherwise, or to liken this to the cases cited by Petitioner, is to say that the Law and Equity Court of the City of Richmond, Virginia, abdicated its responsibilities on Petitioner's own motion which

19. 136 Va. at 171, 118 S.E. at 504-505. (Emphasis added.)
20. *Id.* at 171, 118 S.E. at 505. (Emphasis added.)

she now says "subverted" the "children's welfare." (Pet.'s Brief 9.)

The rule in Virginia with regard to modifying a custody decree is that the decree is *res judicata* as to facts occurring prior to its issuance, and it can be altered only where *subsequent* facts would so dictate. As stated by the Supreme Court of Appeals of Virginia in *Campbell v. Campbell*, 203 Va. 61, 64, 122 S.E. 2d 658, 661 (1961):

> "Section 20-108, Code of 1950, 1960 Replacement Volume, gives the court continuing jurisdiction to change or modify its decree as to the custody and maintenance of minor children, and *if in the future conditions materially change affecting the welfare of the children* the court has the authority to change or modify the decree at any time to meet the changed conditions." (Emphasis added.)

Two recent Virginia cases regarding modification of custody decrees are indicative of what the Virginia court would do in this case. In the first case, *Andrews v. Geyer*, 200 Va. 107, 104 S.E. 2d 747 (1958), the parties had *stipulated a custody agreement* whereby custody of an infant child would be awarded to its father subject to the right of the mother to have the child each summer and during certain holiday periods. A divorce decree was awarded to the father on the basis of the mother's desertion, and *custody was awarded in accordance with the stipulated agreement*. Several years later the mother sought modification of the decree to the extent of obtaining exclusive custody of the child. The mother alleged that the father's remarriage had created a situation to which the child should not be subjected. The trial court modified its earlier decree and awarded full custody to the father.

The decision of the trial court was reversed on appeal, and the *original stipulated custody provisions were reinstated*. The Supreme Court of Appeals of Virginia stated:

> "Clearly, Mrs. Andrews [*the mother*] *utterly failed to show that there had been such change in condition as would warrant the court in giving her the sole custody of her son.* She had abandoned her husband and child in the first instance, and the decree of divorce was based on this abandonment. *She was found to be the guilty party and had agreed to the custody provisions outlined in the decree.*"[21]

In the second case, *Semmes v. Semmes*, 201 Va. 117, 109 S.E. 2d 545 (1959), the parties executed *a property settlement and custody agreement* which awarded custody of their infant daughter to the father except for three summer months. The parties were subsequently divorced, and the provisions of the agreement were incorporated in the decree. Two years later and after the mother had remarried, she sought full custody of her daughter, but the trial court modified its earlier decree and left custody with the father, reducing the period during which the daughter would visit her mother from three months to three weeks.

After the father had remarried, the mother again sought full custody. In commenting on the evidence, the trial court stated:

> "'In other words, *the evidence shows that with either parent the child would have a suitable home, a good education, a normal and healthy environment, and suitable and loving parents.*[22]
>
> "'This being the case, what considerations would justify an alteration of the present arrangement? Certainly, the Court cannot from time to time hear evidence and make a determination that both homes are

21. 200 Va. at 112, 104 S.E. 2d at 751. (Emphasis added.)

22. Identical findings were made in this case by the lower South Carolina courts. The Juvenile and Domestic Relations Court found that "both parties are good people, good family, good parents" (R. 118), and the Court of Common Pleas for Greenville County found that "the custody of these three minor children may well be left in the hands of either the plaintiff [Petitioner] or the defendant [Respondent]." (R. 187)

> suitable, and both parents proper custodians, but that there is a slight balance in favor of one or the other and a change should therefore be made. Such a policy would be not only legally unsound, but practically detrimental to the welfare of the child.' "[23]

On appeal, the decree of the trial court was affirmed except that the three month period during which the daughter would visit the mother, as contained in the original decree, was reinstated.[24]

The factual similarity between the *Andrews* and *Semmes* cases and the case before this Court is striking. In all three cases the wife was the guilty party; in all three cases the wife *agreed* to a grant of primary custody to the husband; and, finally, in the *Andrews*, *Semmes*, and this case there was no evidence of a material change in circumstances following the entry of the first custody decree. In the *Andrews* and *Semmes* cases the Supreme Court of Appeals of Virginia refused to modify the original decree granting custody to the husband. Therefore, the same result would be reached if this case were before a Virginia court.

The South Carolina court was required by the Full Faith and Credit Clause and its implementing statute to apply this Virginia rule for modification to the prior Virginia order.[25] It must give to the Virginia "judicial proceedings . . . the same full faith and credit . . . as they have by law or usage in the courts" of Virginia.

23. As quoted by the Supreme Court of Appeals of Virginia, 201 Va. at 122, 109 S.E. 2d at 548. (Emphasis added.)

24. 201 Va. at 125, 109 S.E. 2d at 550.

25. See Sutera v. Sutera, 1 A.D. 2d 356, 359, 150 N.Y.S. 2d 448, 452 (1956) where the court said:

> "The Special Term was not precluded by the full faith and credit clause of the Federal Constitution from modifying the custodial provisions of the Massachusetts decree if circumstances were established which might have been considered sufficient *in that State* to authorize a similar result." (Emphasis added.)

The fact is that the Supreme Court of South Carolina did not apply the *Virginia* rule for modification, but reached the same result upon application of the *South Carolina* rule. It said:

> "We have held that the Court may at any time on the application of any interested party, or even on its own motion, upon sufficient showing, make further disposition of the custody of a child, *if new facts and circumstances make it necessary or desirable for the child's welfare*. A judicial award of the custody of a child is never final. Ex Parte Atkinson, 238 S.C. 521, 121 S.E. (2d) 4."[26]

D.

THE OPINION OF THE SOUTH CAROLINA COURT DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

While Respondent respectfully submits that the foregoing arguments fairly represent the proper application of the Full Faith and Credit Clause to the custody status of children established by a Virginia "dismissed agreed" order, this issue is not ripe for decision in this case.

Petitioner assumes throughout her brief that the South Carolina court confined its inquiry and rendered its decision solely upon the basis of the "dismissed agreed" order of the Law and Equity Court of the City of Richmond, Virginia. She creates the impression that the South Carolina court found itself so inexorably bound by the order of the Virginia court that it was helpless to consider the issues presented in this case. But there is no foundation for such impression. In her vain quest for a constitutional issue, Petitioner has impressed a tortured construction upon the opinion of the

26. R. 206, 239 S.C. at , 123 S.E. 2d at 39. (Emphasis added.) See also Busbee v. Reese, 125 S.C. 121, 118 S.E. 185 (1923); Hartley v. Blease, 99 S.C. 92, 8 S.E. 991 (1914).

South Carolina court, wholly ignoring the ultimate basis upon which that court decided this case.

Petitioner was denied primary custody of the children because the Supreme Court of South Carolina found "neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action" since the entry of the prior custody decree.[27] This is the ultimate and determinative finding upon which the Supreme Court of South Carolina based its decision. This finding was neither in response to a constitutional mandate nor in derogation of a constitutional guarantee — it flowed solely from the application of the governing law of the state of South Carolina.

The South Carolina court's consideration of the Virginia order—and the effect given it — constituted no more than an intermediate determination which was preliminary to the application of South Carolina law. It considered the Virginia order for the sole purpose of determining whether there had been a prior order relating to custody entered by a court of record. And finding such an order, the Supreme Court of South Carolina held that Petitioner could not obtain custody of the children *under South Carolina law* unless she showed "changed circumstances authorizing a change of the custody."

The Supreme Court of South Carolina found — and correctly so — that the order of dismissal entered by the Virginia court was "*res judicata* in that State" of the issues raised in the habeas corpus proceeding. It accordingly held that it was "*res judicata* and entitled to full faith and credit in this State," and that it must be extended "the same faith and credit in this State . . . as 'by law or usage' the Courts of Virginia would give to such order or judgment."[28] But a

27. R. 205, 239 S.C. at , 123 S.E. 2d at 39.
28. R. 205, 239 S.C. at , 123 S.E. 2d at 39.

further examination of the South Carolina opinion shows that, having determined the Virginia order to be a valid custody decree, the South Carolina court applied *South Carolina law* to determine the effect of that order upon the issues presented to it. The court said:

> "We should point out that we have held in a number of cases that changed circumstances may authorize the change of custody of minor children. We have held that the Court may at any time on the application of any interested party, or even on its own motion, upon sufficient showing, make further disposition of the custody of a child, if new facts and circumstances make it necessary or desirable for the child's welfare. A judicial award of the custody of a child is never final. Ex Parte Atkinson, 238 S.C. 521, 121 S.E. (2d) 4. *Applying this rule to the instant case* and after examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action.
>
> "Since we have reached the conclusion that the dismissed agreed order of the Law and Equity Court of the City of Richmond, Virginia, is a bar to this action between the same parties for the same cause, *in the absence of any allegation or proof of any changed circumstances requiring a change of the custody of the children here involved*, the agreement reached by the parties prior to the order of the Virginia Court is still of full force and effect."[29]

Thus, having determined the nature of the Virginia order, the Supreme Court of South Carolina gave it the same effect as it would give a similar order of its own. The South Carolina court, in firm and positive language, recognized that an award of custody of a child is *never final*. It further recognized and affirmed its *power and duty* as a matter of *local law* to alter a custody arrangement "if new facts and ci-

29. R. 206, 239 S.C. at , 123 S.E. 2d at 39. (Emphasis added

cumstances make it necessary or desirable for the child's welfare."[30]

In the light of these pronouncements, it is difficult to comprehend Petitioner's assertions that the South Carolina court considered itself precluded from discharging its own responsibility by the order of a sister state. The Supreme Court of South Carolina applied South Carolina law to the facts and issues presented to it. This is the law invoked by Petitioner, and she should not be able to escape its consequences by arguing a non-existent constitutional issue.

In any event, a corresponding result would be reached under the rule of comity,[31] probably would be reached under a proper application of South Carolina law to the facts of this case,[32] and was reached under a proper application of North Carolina law to such facts.[33]

30. *Ibid.*

31. See May v. Anderson, 345 U.S. 528 at 535-536 (1953) (Frankfurter, J., concurring).

32. See Powell v. Powell, 231 S.C. 283, 98 S.E. 2d 764 (1957). There "marital difficulty" arose as a result of the mother's adulterous activities, albeit in a South Carolina ball park. Because of this adultery, the Supreme Court of South Carolina awarded custody to the father and pronounced the rule to be followed in its jurisdiction

> "It is usual for the custody of children of divorced parents to be awarded to the parent who is innocent of the conduct which led to the divorce. . . . 'Preference should be given to the party not at fault, and the custody of the child is usually awarded to the party who prevails in a suit for divorce. . . . In some jurisdictions . . . a divorce on the ground of adultery is a conclusive adjudication of the guilty party's unfitness to have custody.' . . . *'Other considerations being equal, . . . it is usual to award custody of children to the innocent spouse.'*" *Id.* at 286, 98 S.E. 2d at 765. (Emphasis added.)

33. Appendix A, pp. 65-71.

CONCLUSION

The Supreme Court of South Carolina correctly held that the Virginia order was *res judicata* as to the issues in the habeas corpus proceeding under Virginia law, and by applying South Carolina law to determine whether custody should be changed, it correctly adhered to its decisions.

There is no federal question of substance in this case, and the writ of certiorari should be dismissed as having been improvidently granted. In any event, if this Court concludes that there is present the "difficult and important" constitutional question, this question was properly decided by the Supreme Court of South Carolina, and the decision of that court should be affirmed.

WESLEY M. WALKER
Leatherwood, Walker, Todd & Mann
P. O. Box 1589
Greenville, South Carolina

JOHN S. DAVENPORT, III
ANGUS H. MACAULAY, JR.
Denny, Valentine & Davenport
1300 Travelers Building
Richmond 19, Virginia

Attorneys for Respondent

APPENDIX A

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

SUMMONS

VS.

BARBARA DALE FORD,
Defendant.

THE STATE OF NORTH CAROLINA

To the Sheriff of the County of Lee and State of North Carolina, and the Sheriff of the County of Greenville, State of South Carolina—GREETING:

You are commanded to summon BARBARA DALE FORD, the defendant, above named, if she be found within your County, to appear before the Clerk of the Superior Court for the County of Lee, at his office in Sanford, within thirty days after the day of service hereof and answer the complaint, a copy of which is served herewith. And let her take notice, that if she fail to answer said complaint within the time above specified, the plaintiff will apply to the Court for the relief demanded in the complaint.

Herein fail not and of this summons make due return.

Given under my hand and seal of said Court, this 19 day of December, 1960.

s/ E. M. UNDERWOOD
Clerk of Superior Court

Received in the office of the Sheriff of Lee County, this 19th day of December, 1960.

Returned: *After due diligence, personal service cannot be had on Barbara Dale Ford in Lee County and State of*

North Carolina. Information secured states Barbara Dale Ford is now residing in County of Greenville, State of South Carolina.

This 19th day of December, 1960.

D. F. HOLDER, Sheriff of Lee County
By /s/ D. F. HOLDER D.S.

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

vs.

BARBARA DALE FORD,
Defendant.

AFFIDAVIT OF SERVICE OF SUMMONS

I, Toy C. Jones, Deputy Sheriff of the County of Greenville, being duly sworn, do certify that on the 21st day of December, 1960, I served the attached process by delivering a copy thereof to Barbara Dale Ford, the party to be served therein named, together with a copy of complaint for absolute divorce on the grounds of adultery, and an order determining the custody of the minor children of the marriage of plaintiff and defendant, who are residents of the State of North Carolina, affidavit for service of process outside of the State, and order for service of process outside the State.

/s G. R. MARTIN
Sheriff of the County of Greenville
By /s/ TOY C. JONES,
Deputy Sheriff

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,

Plaintiff; CLERK'S CERTIFICATE

VS.

BARBARA DALE FORD,

Defendant.

STATE OF SOUTH CAROLINA, COUNTY OF GREENVILLE

I, Margaret W. Ross, Clerk of the C.C.P. & G.S. Court of the County of Greenville, State of South Carolina, do hereby certify that said Court is a Court of record, having the seal hereto attached; that Toy C. Jones is well known to me as a Deputy Sheriff of the County of Greenville, State of South Carolina, and that he has full power and authority to serve any and all legal process issuing from the Courts of this State; that said Toy C. Jones personally appeared before me this date and made and subscribed the attached affidavit relative to the service of process on Barbara Dale Ford, the party to be served therein.

This 21st day of December, 1960.

s/ MARGARET W. ROSS
Clerk of C.C.P. & G.S. Court
State of South Carolina, County of Greenville

IN THE SUPERIOR COURT

STATE OF NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

VS.

BARBARA DALE FORD,
Defendant.

ORDER FOR SERVICE OF PROCESS OUTSIDE THE STATE

An affidavit and a verified pleading, satisfying the requirements of G. S. 1-98.4, having been duly filed herein, and it appearing to the satisfaction of the undersigned that Barbara Dale Ford cannot, after due diligence, be found in the State, it is now, therefore,

ORDERED

That service of process in the above-entitled action upon Barbara Dale Ford be made by service of process outside the State as provided by G. S. 1-104.

This 19 day of December, 1960.

s/E. M. UNDERWOOD
Clerk of Superior Court

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

VS.

BARBARA DALE FORD,
Defendant.

AFFIDAVIT

Being duly sworn, H. Aubrey Ford, Jr., says:

That he is the party plaintiff in a civil action, captioned as above, pending in Lee Superior Court, for divorce on the grounds of adultery committed by his wife, who is the party

defendant and a necessary party to said action, who is the party to be served, and in said action he prays an award of the custody of three minor children who are residents of the State of North Carolina and are the children of the plaintiff and defendant; that such action is one specified by G. S. 1-98.2 and is of such a kind that the Court will have jurisdiction upon service of process by publication or outside of the State; that after due diligence, personal service cannot be had within the State. The name and residence of the defendant, after diligent search and inquiry, is: Barbara Dale Ford, 6-B McDaniel Heights Apartments, Greenville, South Carolina; and said defendant is of full age and competent, according to affiant's information.

s H. AUBREY FORD, JR.

Sworn to and subscribed before me this 19 day of December, 1960.

/s/ E. M. UNDERWOOD
Clerk of Superior Court

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff:

COMPLAINT

VS.

BARBARA DALE FORD,
Defendant.

The plaintiff, complaining of the defendant, alleges:

I

That the plaintiff is a citizen and resident of Lee County in the State of North Carolina, and has been such for more than two years next preceding the commencement of this action;

II

That the defendant Barbara Dale Ford, is currently residing in the County of Greenville, State of South Carolina, and her address is: 6-B McDaniel Heights Apartments, Greenville, South Carolina.

III

That plaintiff and defendant were lawfully married in the City of Richmond, in the State of Virginia, on the 15th day of March, 1952; that there were born of said marriage three children, H. Aubrey Ford, III, age 7 years, Barbara Gray Ford, age 5 years, and James Lowry Ford, age 3 years, now residing with and in custody of plaintiff; that plaintiff and defendant lived together as husband and wife until the 25th day of August, 1959, when plaintiff and defendant separated from each other and have not thereafter lived together as husband and wife.

IV

That on or about the 5th and 6th days of July, 1959, and thereafter, on the 10th and 11th of July, 1959, the defendant was sexually intimate with James T. Sloan, in or near Gloucester, Virginia; that thereafter, on the 25th of July, 1959, the defendant was sexually intimate with James T. Sloan, in or near the City of Richmond, Virginia, and that thereafter, on the 17th day of August, 1959, the defendant was sexually intimate with James T. Sloan, in or near Bowling Green, Virginia, and the defendant has committed adultery with said Sloan on the aforesaid occasions and on other occasions unknown to the plaintiff, prior to and after said dates, and the facts alleged in this paragraph have existed to the knowledge of the plaintiff, for at least six months preceding the filing of this complaint.

V

That the plaintiff is a man of good character and reputation and is a fit and proper person to have the care, custody,

tuition and control of his minor children, H. Aubrey Ford, III, age 7 years, Barbara Gray Ford, age 5 years, and James Lowry Ford, age 3 years, now residing with and in the custody of the plaintiff, in Sanford, North Carolina, and the defendant is not a fit and proper person to have the care, custody, tuition and control of said minor children, and this is an action where an order of custody respecting North Carolina residents should be made.

WHEREFORE the plaintiff prays:

(1) That the bonds of matrimony heretofore existing between the plaintiff and defendant be dissolved absolutely and forever, and the plaintiff be granted an absolute divorce from the defendant;

(2) That an order be entered awarding the plaintiff the care, custody, tuition and control of his minor children, H. Aubrey Ford, III, age 7 years, Barbara Gray Ford, age 5 years, and James Lowry Ford, age 3 years; and

(3) The plaintiff have such other and further relief as he may be entitled in law or in equity.

s/ CLAWSON L. WILLIAMS, JR.
s/ KENNETH R. HOYLE
For: Hoyle & Hoyle
Attorneys for the Plaintiff

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR., first being duly sworn, says:

That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true; and that the plaintiff has been a resident of the State of

North Carolina for more than six (6) months next preceding the institution of this action.

/s/H. AUBREY FORD, JR.

Sworn to and subscribed before me this 19th day of December, 1960.

/s/RUTH THOMAS
Notary Public of Harnett County

My commission expires: September 26, 1961.

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

vs.

BARBARA DALE FORD,
Defendant

SPECIAL APPEARANCE AND MOTION TO DISMISS

NOW COMES Barbara Dale Ford, the defendant herein, and enters a special appearance for the purpose of making this motion and upon such appearance moves the Court to dismiss this action insofar as it relates to custody of the children of the marriage of the plaintiff and the defendant for lack of jurisdiction over the subject matter.

And as grounds for this motion this defendant respectfully shows unto the Court:

1. The children of the marriage of the plaintiff and the defendant do not reside nor are they within the State of North Carolina.

2. Jurisdiction over the custody of the subject children has heretofore been properly assumed and adjudged by the Juvenile and Domestic Relations Court of the County of Greenville, State of South Carolina, in which county and

state the subject children were then and are now present, and to which jurisdiction and judgment the plaintiff herein voluntarily submitted.

This 20th day of January, 1961.

McDERMOTT, CAMERON & HARRINGTON
By s/GEORGE M. McDERMOTT
GEORGE M. McDERMOTT, Attorneys making Special Appearance for the Defendant

Filed in the office of the Clerk of Superior Court of Lee County this 20th day of January, 1961, with copies for Plaintiff's Attorneys of record.

s E. M. UNDERWOOD
E. M. UNDERWOOD, Clerk Superior Court

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY
H. AUBREY FORD, JR.,
Plaintiff

ORDER

VS.

BARBARA DALE FORD,
Defendant

THIS CAUSE coming on to be heard at the February Term of the Superior Court of Lee County before his Honor Henry A. McKinnon, Jr., Judge Presiding, and being duly heard upon the motion of the defendant to dismiss this action in so far as it relates to the custody of the children of the marriage of the plaintiff and defendant, and the Court having fully heard the matter and the argument of Counsel for plaintiff and defendant; it appearing from argument and stipulation of Counsel from which the Court finds the following facts:

1. That the subject action was instituted in the Superior Court of Lee County, North Carolina, on December 19, 1960, and that thereafter on December 21, 1960, service was duly obtained upon the defendant in Greenville, South Carolina, pursuant to an Order for Service of Process outside the State of North Carolina.

2. That on January 20, 1961, through Counsel, defendant filed a Motion in this Court for the dismissal of the subject action in so far as it related to the custody of the children of the marriage of the plaintiff and the defendant on the grounds that they do not reside nor are they within the State of North Carolina, and for the further reason that jurisdiction over the custody of the subject children had theretofore been properly assumed and adjudged by the Juvenile and Domestic Relations Court of the County of Greenville, State of South Carolina, in which County and State the subject children were present and to which jurisdiction and judgment the plaintiff herein voluntarily submitted.

3. That the subject children, H. Aubrey Ford, III, Barbara Gray Ford, and James Lowry Ford are presently in the State of South Carolina in the custody of the defendant, having been returned to her by the plaintiff subsequent to the institution of this action.

It appearing to the Court from the foregoing that it has jurisdiction of the parties in the subject matter; that the matters raised by the Motion are properly a matter for determination on the trial of the subject action; it is therefore,

ORDERED AND ADJUDGED that the Motion of the defendant to dismiss this action in so far as it relates to the custody of the children of the marriage of the plaintiff and defendant be and the same is hereby overruled and denied and it is further ordered that the defendant shall be allowed thirty (30) days from the date of this Order within which

to file answer in this cause.

This 9th day of February, 1961.

/s/ HENRY A. McKINNON, JR.
HENRY A. McKINNON, JR.
Judge Presiding

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff.

VS.

BARBARA DALE FORD,
Defendant.

ANSWER

The defendant, answering the complaint of the plaintiff, says:

I.

Paragraph I and Paragraph III of the complaint are admitted.

II.

It is admitted that the defendant is a resident of the County of Greenville, State of South Carolina, her current address being No. 8-C Terrace Apartments, Greenville, South Carolina.

III.

Paragraph V of the complaint is denied.

IV.

That all allegations of the complaint not hereinabove admitted, explained, or modified are denied by operation of law and pursuant to the Statute Laws of the State of North Carolina.

FOR A FURTHER ANSWER AND DEFENSE, THE DEFENDANT SAYS:

I.

Custody of the minor children of the subject marriage, H. Aubrey Ford, III, Barbara Gray Ford, and James Lowry Ford, has heretofore been awarded to the defendant by the Juvenile and Domestic Relations Court of the County of Greenville, State of South Carolina, in which County and State the subject children were then and are now present; that plaintiff was duly served with process issued by said Court, was represented by Counsel and personally appeared and testified in the Hearing conducted by the said Court; that the matters relating to the custody of the subject children and the fitness of the plaintiff and defendant alleged in the complaint have heretofore been considered and ruled upon by the said Court of the State of South Carolina. Said Order of the Domestic Relations Court has been reviewed on appeal by the Court of Common Pleas for Greenville County, of South Carolina, and such Order was affirmed and custody awarded to the defendant for the nine school months and to the plaintiff for Christmas and summer vacation months.

II.

That the subject children do not reside in nor are they physically present in the State of North Carolina.

WHEREFORE, the defendant having fully answered the complaint of the plaintiff, prays that plaintiff's prayer for relief as set forth in the complaint be denied.

McDERMOTT, CAMERON & HARRINGTON
By /s/GEORGE M. McDERMOTT
Attorneys for Defendant

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

BARBARA DALE FORD, first being duly sworn, says:

That she has read the foregoing Answer and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated upon information and belief, and as to those matters she believes it to be true.

s/ BARBARA D. FORD

Sworn to and subscribed before me this 10th day of March, 1961.

signature illegible.
Notary Public for the State of South Carolina

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

vs.

BARBARA DALE FORD,
Defendant.

MOTION TO STRIKE AND REPLY

Now comes, H. Aubrey Ford, Jr., the plaintiff herein and moves to strike from the answer filed in this action all of Paragraph 4 therein because same is irrelevant, immaterial and improper, for that same is not a general or specific denial of each material allegation of the complaint as required by law and constitutes a sham or irrelevant answer, in that said answer has no substantial relation to the controversy and presents no defense to the action and states no facts but only conclusions of law, and therefore puts no fact in issue and that the plaintiff would be prejudiced and damaged if said allegations are allowed to stand as now appear in

said answer. And notice is hereby given that upon trial of the cause the plaintiff will move the Court to hear said motion to strike.

THE PLAINTIFF REPLYING TO THE FURTHER ANSWER AND DEFENSE OF THE DEFENDANT FILED IN THIS CAUSE, SAYS AND ALLEGES:

1. That the allegations of Paragraph I of the defendant's further answer and defense are untrue and are denied, it being specifically denied that the Court of Common Pleas for the County of Greenville, South Carolina, affirmed the order of the Juvenile and Domestic Relations Court of the County of Greenville, South Carolina, all of which matters are on appeal and subject to review. That plaintiff and defendant entered into an agreement duly and legally made between themselves by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia. That pursuant to said agreement the custody of the three children was agreed upon in writing by correspondence between respective legal counsel of the parties. According to said agreement the defendant was to have custody of the children for the summer period beginning two weeks from the date the last child completes the school year and ending two days before the first child is to return to School in September and except as otherwise specifically provided, it was expressly agreed that the plaintiff would have custody for the remainder of the year. As a part of his reply the plaintiff incorporates by reference the copies of the correspondence between legal counsel for the plaintiff and legal counsel for the defendant whereby an agreement was duly made between the parties with the knowledge and permission of said Law and Equity Court of the City of Richmond, Virginia, and subsequent to which agreement the said action was dismissed. The plaintiff alleges that he is entitled

to the custody of the minor children according to the terms and provisions of said agreement between the parties. As a part of his reply, the plaintiff incorporates by reference copies of all of the proceedings in said Court, including the order of dismissal on the 18th day of November, 1959. Further, the defendant has violated and breached the agreement made between the parties by and with their respective legal counsel and violated the order of the Court of record in Richmond, Virginia, that was duly issued and based upon said agreement by instituting a proceeding without cause in the State of South Carolina, and that for all purposes the proceeding in the Law and Equity Court of the City of Richmond, Virginia, and the agreements and the order based thereon were res judicata between the parties.

2. The allegations of Paragraph 2 of the defendant's further answer and defense are untrue and are denied, it being alleged that said children are citizens of the State of North Carolina and were physically present in the said State when this action was instituted and while the children of this marriage may be temporarily absent from this State from time to time, that such absences are pursuant to the agreement duly and legally made between the plaintiff and defendant by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia; asset forth in the preceding paragraph.

WHEREFORE, the plaintiff having replied to the further answer and defense of the defendant, renews his prayer for relief as set forth in his complaint.

/s/KENNETH R. HOYLE
For: Hoyle & Hoyle, Attorneys for Plaintiff

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR., first having been duly sworn, deposes and says:

That he is the plaintiff in the foregoing action; that he has read the foregoing reply and knows the contents thereof; that the same is true of his own knowledge, except as to matters stated on information and belief, and as to those he believes it to be true.

/s/H. AUBREY FORD, JR.

Sworn to and subscribed before me this 18 day of March, 1961.

/s/RUTH THOMAS
Notary Public of Harnett County

My commission expires: Sept. 26, 1961.

Law Offices
Denny, Valentine & Davenport
Travelers Building
Richmond, Virginia
October 26, 1959

Mr. Alexander W. Parker
Attorney at Law
Mutual Building
Richmond, Virginia

Dear Alex:

Re: *H. Aubrey Ford, Jr. v. Barbara D. Ford*

This letter concerns the subject of the conference held this morning in my office at which Aubrey and Barbara were present with you and me.

As a proposal for settlement of the question of custody of the three Ford children, Aubrey has authorized me to convey the following:

1. Barbara is to have the children for the summer period beginning two weeks from the date the last child completes the school year in June and ending two days before the first child is to return to school in September. Except as set forth below Aubrey is to have custody for the remainder of the year.

2. During the time that Aubrey is on the Kentucky-Tennessee tobacco market between the latter part of November and the middle of December and in Europe in the spring, to the extent it does not interfere with school the children are to visit Barbara or Barbara to visit them in Sanford, whichever Aubrey and Barbara may agree to at the time. Aubrey tells me that there may be times when he will not be required to stay on the Kentucky-Tennessee market for more than two or three days at a time. I think it should be understood that in those cases this provision is not applicable.

3. With reference to the Christmas vacation period Aubrey will agree that one of them shall have the children from the beginning of vacation until December 27 and the other for the balance of the vacation. These periods are to be reversed from year to year so that one parent will have the first part of vacation in one year and the latter part of vacation in the following year. He will further agree that an effort be made in each year to the extent possible under the circumstances that the family be in the same locality for the whole period.

4. It is understood that when the children are with Barbara they are not to be in Richmond or Gloucester.

5. Aubrey will, of course, provide for the children. When the children are with Barbara he will make a reasonable allowance to her for their maintenance and support but it is to be understood that she is not to incur any expenses or bills without Aubrey's prior approval.

6. It is, of course, understood that when the children are with either parent the other is to have the right to visit at reasonable times.

It is planned that little Aubrey will remain with Barbara until Christmas vacation so as not to interrupt his school in the meantime. After Barbara has established herself wherever it may be, Aubrey will consider letting Jay be with Barbara most of the time until he is ready for school.

If Barbara agrees to the above terms, it is desirable that this settlement be effective immediately so that Aubrey and the two youngest children can go to Sanford with his mother as soon as possible. After you have had a chance to review this and discuss it with Barbara, I will appreciate a prompt reply.

Sincerely yours,

JOHN S. DAVENPORT, III

JSD:mah

Christian, Barton, Parker & Boyd
Mutual Building
Richmond 19, Virginia
October 27, 1959

John S. Davenport, III, Esq.
Travelers Building
Richmond 19, Virginia

In re: *H. Aubrey Ford, Jr. v. Barbara D. Ford*

Dear John:

I have your letter of October 26th and have thoroughly discussed it and our conference with Barbara.

Generally speaking we are in accord with all of the contents of your letter.

We do have a couple of suggestions:

1. In paragraph 1 we would like to delete the words "in June" appearing on the third line.

2. We would like for paragraph 4 to read as follows:

"It is understood that when the children are with Barbara they are not to be in Gloucester. Also that when the children are with Barbara they are not to live in Richmond, but Barbara shall be privileged to bring the children to visit in Richmond provided that such visits shall not aggregate in time more than two weeks out of each year."

As I understand from you on telephone these changes will be agreeable to you and Aubrey. If that be true, then please let me know and we will consider this a matter accomplished.

I assume, pursuant to the agreement that you and I had, that the suit in the Law and Equity Court will be dismissed promptly.

Very sincerely yours,

/s/ Alexander W. Parker

awp: hw

Law Offices
Denny, Valentine & Davenport
Travelers Bldg.
Richmond, Virginia
October 27, 1959

Mr. Alexander W. Parker
Christian, Barton, Parker & Boyd
Mutual Building
Richmond, Virginia

Dear Alex:

Re: *H. Aubrey Ford, Jr. v. Barbara D. Ford*

I acknowledge your letter of this date in reply to mine of October 26.

The two suggested changes which you set forth are agreeable to Aubrey and consequently, we may consider this as an accomplished matter.

I will submit to you in the next few days an order dismissing the case in the Law and Equity Court.

Sincerely yours,

JOHN S. DAVENPORT, III

JSD:mah
bc. Mr. H. Aubrey Ford, Jr.

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

H. AUBREY FORD, JR.,
Petitioner,

v.

BARBARA DALE FORD,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Judges of the Law & Equity Court of the City of Richmond

Your petitioner, H. Aubrey Ford, Jr., exhibits this his petition against Barbara Dale Ford, his wife, and respectfully represents as follows:

1. That he is the father and she is the mother of three children, namely, H. Aubrey Ford, III, six (6) years of age; Barbara Gray Ford, four (4) years of age; and James Lowry Ford, two (2) years of age. Petitioner is a resident of the State of North Carolina and resides in Carbonton Heights in the City of Sanford in said State. He is employed by Tobacco Merchants Corporation of New York City and the Sanford Tobacco Company, Sanford, North Carolina.

2. Respondent has recently been guilty of acts which were not only of a nature that would justify petitioner seeking a divorce from her but which render her unfit to have the cus-

tody of said children. Knowledge of those acts first came to petitioner on August 15 when he was at home in Sanford, North Carolina, with the children above mentioned and his wife, the respondent, was visiting members of her family in Gloucester and in Richmond, Virginia. On the return of his wife to Sanford, North Carolina, in the middle of the following week conversations were had between petitioner and respondent concerning their future and the future of the children and in order that respondent might seek the advice of her mother and other members of her family, petitioner drove respondent to Richmond on Tuesday, August 25, leaving respondent at the home of respondent's mother in Richmond. Petitioner spent the night in Richmond at the home of his mother, having made arrangements for the children and their nurse to spend the night with friends of petitioner in Sanford, North Carolina.

3. Fearful lest respondent might clandestinely return to North Carolina, seize the children and take them, petitioner arranged on Wednesday, August 26, to have the children taken from Sanford a distance of some 35 to 40 miles to Fayetteville, North Carolina, with their nurse. Petitioner together with his mother met the children and the nurse in Fayetteville on the night of Wednesday, August 26, they having been driven to Fayetteville by petitioner's chauffeur.

4. Petitioner, his mother, the three children and the nurse spent the night of August 26 at a motel in Fayetteville. The following morning petitioner left for his office in Sanford, leaving the children with his mother and their nurse. He had scarcely left the motel when respondent and her sister appeared in an automobile, took the children over the protest of the nurse and petitioner's mother and left.

5. Petitioner believes that respondent with the children are now at the home of respondent's mother, Mrs. R. Finley Gayle, Jr., 311 Charmain Road, Richmond, Virginia.

6. Petitioner alleges the positions as aforesaid which he occupies are permanent positions at ample salary and sufficient to enable him to properly provide for the education, maintenance and support of his children; that he is able to provide a comfortable home for his children and has been doing so where they reside in Sanford, North Carolina, and that his mother, who is a widow, is ready and willing to make her home with petitioner to help him oversee and care for the children.

7. Petitioner alleges that respondent is not a fit and proper person to have the custody of the said minor children and that petitioner is a fit and proper person to have such custody and that the best interests of said children would be promoted by them being forthwith returned to the care, custody and control of petitioner.

WHEREFORE, petitioner prays that a writ of *habeas corpus ad subjiciendum* may issue directed to the said Barbara Dale Ford requiring her to produce the bodies of H. Aubrey Ford, III, Barbara Gray Ford and James Lowry Ford, before the court at a time and place therein specified and to do and receive what shall then and there be considered by the court concerning said children, together with the cause of said detention, and that the petitioner have the care, custody and possession of said children.

/s/H. Aubrey Ford, Jr.
Petitioner

STATE OF VIRGINIA
CITY OF RICHMOND, to-wit:

This day H. Aubrey Ford, Jr., the petitioner in the foregoing petition, personally appeared before me, Mae Anderson Hobbs, a notary public in and for the City aforesaid in the State of Virginia, and made oath that the matters and

things stated in the aforegoing petition are true; except in so far as they are alleged on information and belief and as to matters alleged on information and belief he believes them to be true.

Given under my hand this 28th day of August, 1959.
My commission expires March 28, 1961.

s/ Mae Anderson Hobbs
Notary Public
Commissioned Mae Anderson

Denny, Valentine & Davenport
1300 Travelers Building
Richmond, Virginia
Counsel for Petitioner

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

H. Aubrey Ford, Jr.,
Petitioner,

ORDER AWARDING WRIT OF HABEAS CORPUS

Barbara Dale Ford,
Respondent.

This day came H. Aubrey Ford, Jr. by his attorney and presented to the Court his verified petition praying for a writ of *habeas corpus ad subjiciendum*, and it appearing therefrom that there is probable cause to believe that the infant children mentioned in said petition to-wit: H. Aubrey Ford, III, Barbara Gray Ford, James Lowry Ford, are illegally detained and the custody of said infant children illegally held by respondent, Barbara Dale Ford, in the City of Richmond, Virginia, it is ordered that a writ of *habeas corpus ad subjiciendum* be, and the same is hereby ordered to be, issued

out of the Clerk's office of this Court, directed the said Barbara Dale Ford, commanding her to have and produce the bodies of the said infants as aforesaid, before the Court on the 2nd day of September, 1959, at 10:30 A.M. in the forenoon on that day, to do and receive what is then and there been considered concerning the said infants and that she have then and there said writ of habeas corpus ad subjiciendum.

It is ordered that an attested copy of this order shall serve as the writ above mentioned.

Judge

REVERSE SIDE

Executed in the City of Richmond, Virginia, this 28th day of August, 1959, by delivering a true copy of the within Order in writing to Barbara Dale Ford in person.

JAMES H. YOUNG
Sheriff, City of Richmond, Va.
By /s/E. L. McGREGOR
Deputy Sheriff

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

H. AUBREY FORD, JR.,
Petitioner,

v.

BARBARA DALE FORD,
Respondent.

RETURN ON WRIT OF HABEAS CORPUS

Respondent, Barbara Dale Ford, for answer to the petition of H. Aubrey Ford, Jr., and the writ of habeas corpus *ad subjiciendum* which was issued from the Clerk's Office of the Law and Equity Court of the City of Richmond on the 28th day of August, 1959, says that she now here produces the bodies of the said H. Aubrey Ford, III, Barbara Gray Ford and James Lowry Ford, the infant children named in

the said petition for the writ, but by agreement of counsel the physical presence of said infant children not being required, and for further return and answer to the said writ alleges and avers:

1. That the respondent is and always has been a fit and proper person to have custody of the said infant children.

2. That the said writ was issued improvidently and without probable cause.

And now having fully answered, respondent prays that the said writ may be discharged and that she may be awarded her costs upon her return to the writ aforesaid in this behalf expended.

/s/ BARBARA DALE FORD
BARBARA DALE FORD

STATE OF VIRGINIA
CITY OF RICHMOND, to-wit:

This day Barbara Dale Ford, the respondent in the foregoing return, personally appeared before me, Hazel M. Walters, a Notary Public in and for the City aforesaid, in the State of Virginia, and made oath that the matters and things stated in the foregoing return are true except in so far as they are alleged to be on information and belief and as to matters alleged on information and belief she believes them to be true.

Given under my hand this 2nd day of September, 1959.

My commission expires the 28th day of November, 1961.

/s/HAZEL M. WALTERS
Notary Public

Christian, Barton, Parker & Boyd
500-506 Mutual Building
Richmond, Virginia—Counsel
/s/ALEX W. PARKER
Of Counsel

CERTIFICATE

I certify that on the 2nd day of September, 1959, a copy of the within return was delivered to John S. Davenport, III, Esq., Denny, Valentine and Davenport, 1300 Travelers Building, Richmond, Virginia, counsel of record for petitioner.

/s ALEX W. PARKER

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

H. AUBREY FORD, JR.,
Petitioner

v.

BARBARA DALE FORD,
Respondent

MOTION TO QUASH THE WRIT OF HABEAS CORPUS

Respondent, Barbara Dale Ford, moves the Honorable Court to quash the writ of habeas corpus *ad subjiciendum* which was issued from the Clerk's Office of the Law and Equity Court of the City of Richmond on August 28, 1959, for the reason that the petition for the issuance of said writ is insufficient in that it fails to show or allege probable cause that the infant children named therein, to-wit, H. Aubrey Ford, III, Barbara Gray Ford and James Lowry Ford, are detained without lawful authority.

/s/ BARBARA DALE FORD
BARBARA DALE FORD

Christian, Barton, Parker & Boyd
500-506 Mutual Building
Richmond, Virginia—Counsel
/s/ ALEX W. PARKER
Of Counsel

CERTIFICATE

I certify that on the 2nd day of September, 1959, a copy of the within motion was delivered to John S. Davenport, III, Esq., Denny, Valentine and Davenport, 1300 Travelers Building, Richmond, Virginia, counsel of record for petitioner.

s ALEX W. PARKER

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

H. AUBREY FORD, JR.,
Petitioner,

v. ORDER OF DISMISSAL

BARBARA DALE FORD,
Respondent.

It being represented to the Court by Counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed.

Enter:

J. H. R.

Nov. 18, 1959

Judge

November , 1959

A Copy

Teste: LUTHER LIBBY, JR., *Clerk*
By s/ EDWARD G. KIDD

We ask for this:

s/ JOHN S. DAVENPORT
Counsel for the Petitioner
s/ ALEXANDER W. PARKER
Counsel for the Respondent

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

MOTION

VS.

BARBARA DALE FORD,
Defendant

Now comes, Barbara Dale Ford, the defendant herein and moves the Court that the portions of Plaintiff's Reply as hereinafter set out be stricken for the reasons hereinafter stated:

I

All that portion of paragraph 1 of the Plaintiff's Reply which reads as follows:

"That plaintiff and defendant entered into an agreement duly and legally made between themselves by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia. That pursuant to said agreement the custody of the three children was agreed upon in writing by correspondence between respective legal counsel of the parties. According to said agreement the defendant was to have custody of the children for the summer period beginning two weeks from the date the last child completes the school year and ending two days before the first child is to return to School in September and except as otherwise specifically provided, it was expressly agreed that the plaintiff would have custody for the remainder of the year. As a part of his reply the plaintiff incorporates by reference the copies of the correspondence between legal counsel for the plaintiff and legal counsel for the defendant whereby an

agreement was duly made between the parties with the knowledge and permission of said Law and Equity Court of the City of Richmond, Virginia, and subsequent to which agreement the said action was dismissed. The plaintiff alleges that he is entitled to the custody of the minor children according to the terms and provisions of said agreement between the parties. As a part of his reply, the plaintiff incorporates by reference copies of all of the proceedings in said Court, including the order of dismissal on the 19th day of November, 1959. Further, the defendant has violated and breached the agreement made between the parties by and with their respective legal counsel and violated the order of the Court of record in Richmond, Virginia, that was duly issued and based upon said agreement by instituting a proceeding without cause in the State of South Carolina, and that for all purposes the proceeding in the Law and Equity Court of the City of Richmond, Virginia, and the agreements and the order based thereon were res judicata between the parties" for that the same is argumentative, evidential and attempts to state a conclusion of the pleader.

II

All that portion of paragraph 2 of the Plaintiff's Reply which reads as follows:

"that such absences are pursuant to the agreement duly and legally made between the plaintiff and defendant by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia, as set forth in the preceding paragraph" for that the same is argumentative, evidential and attempts to state a conclusion of the pleader.

WHEREFORE, the defendant moves the Court that the foregoing portions of the Plaintiff's Reply be stricken from the record for the reasons hereinabove stated and for the

further reason that evidence in support of said allegations would be improper and inadmissible on the trial of this action and that the defendant would be prejudiced and damaged if the said allegations are allowed to stand as now appear in the said Reply.

This 6th day of May, 1961.

McDERMOTT, CAMERON & HARRINGTON
By /s/GEORGE M. McDERMOTT
Attorneys for Defendant

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

ORDER

VS.

BARBARA DALE FORD,
Defendant

The above entitled action coming on to be heard at the May Term of the Superior Court of Lee County, before His Honor, George M. Fountain, Judge Presiding, on written Motions of the parties to strike certain portions of the Answer and Reply filed herein by the respective parties, and the Court having fully heard the matter and the argument of Counsel for plaintiff and defendant;

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That paragraph IV of the defendant's Answer as filed herein be stricken and upon motion of the defendant in open

Court leave is hereby granted for the defendant to file an Amendment to the deleted portion of the said Answer on or before May 29, 1961, in accordance with said Motion.

2. That the following be stricken from paragraph 1 of plaintiff's Reply:

"That plaintiff and defendant entered into an agreement duly and legally made between themselves by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia. That pursuant to said agreement the custody of the three children was agreed upon in writing by correspondence between respective legal counsel of the parties. According to said agreement the defendant was to have custody of the children for the summer period beginning two weeks from the date the last child completes the school year and ending two days before the first child is to return to School in September and except as otherwise specifically provided, it was expressly agreed that the plaintiff would have custody for the remainder of the year. As a part of his reply the plaintiff incorporates by reference the copies of the correspondence between legal counsel for the plaintiff and legal counsel for the defendant whereby an agreement was duly made between the parties with the knowledge and permission of said Law and Equity Court of the City of Richmond, Virginia, and subsequent to which agreement the said action was dismissed. The plaintiff alleges that he is entitled to the custody of the minor children according to the terms and provisions of said agreement between the parties. As a part of his reply, the plaintiff incorporates by reference copies of all of the proceedings in said Court, including the order of dismissal on the 18th day of November, 1959. Further, the defendant has violated and breached the agreement made between the parties by and with their respective legal counsel and violated the order of the Court of record in Richmond.

Virginia, that was duly issued and based upon said agreement by instituting a proceeding without cause in the State of South Carolina, and that for all purposes the proceeding in the Law and Equity Court of the City of Richmond, Virginia, and the agreements and the order based thereon were res judicata between the parties."

3. That the following be stricken from paragraph 2 of plaintiff's Reply:

"that such absences are pursuant to the agreement duly and legally made between the plaintiff and defendant by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia, as set forth in the preceding paragraph."

This 10th day of May, 1961.

/s/GEORGE M. FOUNTAIN
GEORGE M. FOUNTAIN, Judge Presiding

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY
H. AUBREY FORD, JR.,
Plaintiff

AMENDMENT TO ANSWER

VS.

BARBARA DALE FORD,
Defendant

The defendant by leave of court first had and obtained, amends her Answer heretofore filed in this action, by striking out paragraph IV and inserting in lieu thereof the following:

IV

Paragraph IV of the Complaint is not answered.

And except as hereby amended, defendant adopts and ratifies her original Answer as fully as if herein set out.

McDERMOTT, CAMERON & HARRINGTON
By s/GEORGE M. McDERMOTT
Attorneys for Defendant

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

BARBARA DALE FORD, first being duly sworn, says: That she has read the foregoing Amendment to Answer and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated upon information and belief, and as to those matters she believes it to be true.

s/ BARBARA D. FORD

Sworn to and subscribed before me this 29 day of May, 1961.

s/O. G. CALHOUN
Notary Public for the State of South Carolina

My commission expires at the pleasure of the Governor

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff,

vs. ORDER

BARBARA DALE FORD,
Defendant.

THIS CAUSE coming on to be heard at the May 1962 Term of Superior Court of Lee County, before His Honor Hal H. Walker, Judge Presiding, upon the motion of the

plaintiff for leave to file an amendment to his complaint, and the Court in the exercise of its discretion being of the opinion that such motion should be granted;

IT IS NOW ORDERED that the plaintiff be and he is hereby allowed to file said amendment as a part of the record of this action;

And the defendant is allowed 30 days from the date of this order within which to file answer or demurrer to said amendment.

This 14th day of May, 1962.

s/HAL H. WALKER
Judge Presiding

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

vs.

BARBARA DAIE FORD,
Defendant.

AMENDMENT TO COMPLAINT

The plaintiff, by leave of the Court first had and obtained, amends his complaint heretofore filed in this cause, by adding the following numbered paragraphs and inserting after Paragraph 5, the following:

AND FOR A SECOND AND ADDITIONAL CAUSE OF ACTION, THE PLAINTIFF COMPLAINING OF THE DEFENDANT, ALLEGES AND SAYS:

I

That the plaintiff is a citizen and resident of Lee County in the State of North Carolina, and has been such for more

than two years next preceding the commencement of this action.

II

That the defendant Barbara Dale Ford, is currently residing in the County of Greenville, State of South Carolina;

III

That plaintiff and defendant were lawfully married in the City of Richmond, in the State of Virginia, on the 15th day of March, 1952; that there were born of said marriage three children, H. Aubrey Ford, III, Barbara Gray Ford, and James Lowry Ford; that plaintiff and defendant lived together as husband and wife until the 25th day of August, 1959, when plaintiff and defendant separated from each other and have not thereafter lived together as husband and wife.

IV

That since the 25th day of August, 1959, the plaintiff and defendant have lived continuously separate and apart from each other and at no time resumed their marital relationship which formerly existed between them.

And except as hereby amended, plaintiff adopts and ratifies his original complaint as fully as if herein set out.

DENNY, VALENTINE & DAVENPORT
CLAWSON L. WILLIAMS, JR.
HOYLE & HOYLE
By /s/KENNETH R. HOYLE
Attorneys for Plaintiff

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR., being first duly sworn, says:

That he has read the foregoing amendment to complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon

information and belief, and as to those matters he believes it to be true.

/s/H. AUBREY FORD, JR.

Sworn to and subscribed before me this 10th day of May, 1962.

s/RUTH THOMAS
Notary Public of Harnett County

My commission expires: Sept. 26, 1963.

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff,

vs.

BARBARA DALE FORD,
Defendant.

ANSWER TO AMENDMENT TO COMPLAINT

The defendant, answering the Second and Additional Cause of Action as set out in Plaintiff's Amendment to Complaint, alleges;

1.

That the allegations contained in paragraph I of said Second Cause of Action are admitted;

2.

That the allegations contained in paragraph II of said Second Cause of Action are admitted;

3.

That the allegations contained in Paragraph III of said Second Cause of Action are admitted;

4.

That the allegations contained in paragraph IV of said Second Cause of Action are admitted;

WHEREFORE, the defendant, having fully answered the Second and Additional Cause of Action as set out in Plaintiff's Amendment to Complaint, does not resist the granting of the divorce for the reasons set out in the Second and Additional Cause of Action; and except as herein specifically admitted defendant adopts and ratifies her original Answer as if fully set out herein.

McDERMOTT, CAMERON & HARRINGTON
By s/ GEORGE M. McDERMOTT
Attorneys for Defendant

7

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

BARBARA DALE FORD, being duly sworn, says that she has read the foregoing Answer to the Second and Additional Cause of Action as set out in Amendment to Complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated upon information and belief, and as to those matters she believes it to be true.

s/ BARBARA D. FORD

Sworn to and subscribed before me this 31st day of May, 1962.

s/ ELLEN M. LACKABY
Notary Public for the State of South Carolina
My comm. expires at the pleasure of the Governor.

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

vs.

BARBARA DALE FORD,
Defendant

ORDER

THIS CAUSE coming on to be heard before the undersigned Judge in Chambers on motion of J. Allen Harrington, of counsel for defendant; that this action be ordered calendared and tried at the earliest possible date and it appearing to the Court and the Court finding as a fact that John S. Davenport, Jr., Attorney at Law, Richmond, Virginia, is of counsel for the plaintiff and that he is presently outside the continental United States and will return on or about May 28, 1962; and it further appearing from statement of counsel for the plaintiff that the plaintiff will move to amend his Complaint at the May 7, 1962 term of Lee County Superior Court to add a second cause of action for divorce based on the grounds of two years separation; and that this cause will be ready for trial at the August 6, 1962 term of Lee County Superior Court.

IT IS, THEREFORE, ORDERED that this matter be peremptorily set for trial as the first contested case in Lee County Superior Court for the term beginning August 6, 1962

s/C. W. HALL
Judge Holding Courts in the Eleventh Judicial District

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

vs.

ISSUES

BARBARA DALE FORD,
Defendant.

1. Were the plaintiff and defendant married to each other as alleged in the complaint?

Answer: *Yes.*

2. Has the plaintiff been a resident of the State of North Carolina for more than six months next preceding the bringing of this action?

Answer: *Yes.*

3. Have the plaintiff and defendant lived separate and apart from each other continuously for a period of two years next preceding the assertion of this cause of action, as alleged in the amendment to the Complaint?

Answer: *Yes.*

Judgment #12,409 Recorded on Judgment Docket No. 16—Page 389 & 390.

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

JUDGMENT

vs.

SD 6159 CID 3262

BARBARA DALE FORD,
Defendant.

THIS CAUSE coming on to be heard and being heard before His Honor, Edward B. Clark, Judge Presiding and a

Jury at the August term of the Superior Court of Lee County, and the following issues having been submitted to and answered by the Jury:

1. Were the plaintiff and defendant married to each other as alleged in the complaint?

Answer: "Yes."

2. Has the plaintiff been a resident of the State of North Carolina for more than six months next preceding the bringing of this action?

Answer: "Yes."

3. Have the plaintiff and the defendant lived separate and apart from each other continuously for a period of two years next preceding the assertion of this cause of action as alleged in the amendment to the complaint?

Answer: "Yes."

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff H. Aubrey Ford, Jr., be and he is hereby granted an absolute divorce from the defendant Barbara Dale Ford, and that the bonds of matrimony heretofore existing between the plaintiff and defendant be and they are hereby dissolved.

This matter coming on to be heard on the motion of the plaintiff for an award of custody of the three minor children, namely, H. Aubrey Ford, III, age 9, Barbara Gray Ford, age 7 and James Lowry Ford, age 5, and plaintiff appearing in person and by counsel and defendant appearing by counsel and the children being within the jurisdiction of the Court, and it appearing to the Court from the pleadings and the evidence, and the Court, after due inquiry and from the evidence and argument of counsel, finds as a fact:

That at the time of their separation the plaintiff, the defendant and the said children were domiciliaries and resi-

dents of Lee County, State of North Carolina; that upon separation the defendant removed the infant children to Richmond, Virginia; that neither party was a legal resident of said state; that the plaintiff instituted a habeas corpus proceeding in the Law and Equity Court of the City of Richmond, Virginia, seeking the custody of the children, and the children and the subject matter were subject to the jurisdiction of said Virginia Court; that pending hearing in said proceeding, plaintiff and defendant, both represented by counsel, reached an agreement concerning the custody of said children, the substance of which is:

(1) Defendant is to have the children for the summer period, beginning two weeks from the date the last child completes the school year, and ending two days before the first child is to return to school in September. Except as set forth below plaintiff is to have custody for the remainder of the year.

(2) During the time that plaintiff is on the Kentucky-Tennessee tobacco market, for more than three days, between the latter part of November and the middle of December and in Europe in the spring, to the extent it does not interfere with school the children are to visit defendant or defendant to visit them in Sanford, whichever plaintiff and defendant may agree to at the time.

(3) During the Christmas vacation period one of the parties shall have the children from the beginning of vacation until December 27 and the other for the balance of the vacation. These periods are to be reversed from year to year so that one party will have the first part of vacation in one year and the latter part of vacation in the following year.

(4) When the children are with defendant, they shall not be in Gloucester, Virginia. Also, when the children are with defendant, they shall not live in Richmond, Virginia, but defendant shall be privileged to bring the children to visit in

Richmond, provided that such visits shall not aggregate in time more than two weeks out of each year.

(5) Plaintiff will provide for the children. When the children are with defendant, plaintiff will make a reasonable allowance to defendant for the maintenance and support of the children, but defendant shall not incur any expenses or bills without plaintiff's prior approval.

(6) When the children are with either party, the other party is to have the right to visit the children at reasonable times.

That thereupon a "dismissed agreed" order was entered by said Court on motion of counsel for both parties on the 18th of November, 1959, that the legal residence of the plaintiff and infant children has continued to be Lee County, North Carolina, and this Court has jurisdiction over the parties hereto and the children which are now the subject of this custody proceeding; that upon this hearing on custody this day and upon inquiry by the Court, both parties by counsel disaffirmed any contention of and did not offer to show any change of circumstances of the parties since their agreement and the entry of the "dismissed agreed" order of the Virginia Court that would justify this Court in making any change in the custody arrangements in said agreement, which terms of agreement meet with the approval of this Court, and this Court finds that such custodial arrangement is in the best interest of said infant children.

Subsequent to the "dismissed agreed" order of the Virginia Court, the defendant moved to the State of South Carolina, and on August 10, 1960, instituted an action in the Juvenile and Domestic Relations Court of Greenville County, South Carolina, seeking the custody of said infant children and obtained service of process on the plaintiff when he was in Greenville to visit his children while they were there pursuant to the Virginia order. Said Juvenile and Domestic

Relations Court issued an order dated December 8, 1960, awarding custody of said children to the defendant. Plaintiff appealed to the Court of Common Pleas of said County, which issued an order dated February 25, 1960, which modified the order of said Juvenile and Domestic Relations Court, by awarding divided custody to the parties. This order, counsel for the defendant at the hearing herein, argued and contended is the law of the case in South Carolina, and is entitled to full faith and credit under the Constitution of the United States. An appeal was duly taken by plaintiff to the Supreme Court of South Carolina, which issued its opinion and judgment dated November 15, 1961, reversing the decree of said Court of Common Pleas, holding that pursuant to the "dismissed agreed" order of the Virginia Court, the agreement reached by the parties prior to the order of the Virginia Court was still of full force and effect. The South Carolina Supreme Court, by order dated December 11, 1961, refused defendant's petition for re-hearing and by order dated December 15, 1961, denied defendant's motion for a stay of Remittitur and thereupon certified down its opinion of reversal. Upon application of the defendant, the Supreme Court of the United States stayed execution and enforcement of the judgment of the Supreme Court of South Carolina and granted certiorari.

UPON CONSIDERATION WHEREOF, NOW THEREFORE, IT IS FURTHER ORDERED, AD JUDGED AND DECREED that the plaintiff is to have the care, custody, tuition and control of H. Aubrey Ford, III, age 9, Barbara Gray Ford, age 7 and James Lowry Ford, age 5, subject to the following:

(1) Defendant is to have the children for the summer period beginning two weeks from the date the last child completes the school year and ending two days before the first child is to return to school in September. Except as set

forth below plaintiff is to have custody for the remainder of the year.

(2) During the time that plaintiff is on the Kentucky-Tennessee tobacco market, for more than three days, between the latter part of November and the middle of December and in Europe in the spring, to the extent it does not interfere with school the children are to visit defendant or defendant to visit them in Sanford, whichever plaintiff and defendant may agree to at the time.

(3) During the Christmas vacation period one of the parties shall have the children from the beginning of vacation until December 27 and the other for the balance of the vacation. These periods are to be reversed from year to year so that one party will have the first part of vacation in one year and the latter part of vacation in the following year.

(4) When the children are with defendant, they shall not be in Gloucester, Virginia. Also, when the children are with defendant, they shall not live in Richmond, Virginia, but defendant shall be privileged to bring the children to visit in Richmond, provided that such visits shall not aggregate in time more than two weeks out of each year.

(5) Plaintiff will provide for the children. When the children are with defendant, plaintiff will make a reasonable allowance to defendant for the maintenance and support of the children, but defendant shall not incur any expenses or bills without plaintiff's prior approval.

(6) When the children are with either party, the other party is to have the right to visit the children at reasonable times.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, a resident of South Carolina, shall not remove the children from this State before the next Christmas vaca-

tion as provided in Para (3) above.

This 9th day of August, 1962.

s/ EDWARD B. CLARK
Judge Presiding

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

VS. NOTICE

BARBARA DALE FORD,
Defendant

TO THE RESPONDENT ABOVE NAMED TAKE NOTICE:

That the Petitioner hereby given notice of appeal to the Supreme Court of North Carolina from the judgment rendered herein by His Honor Edward B. Clark, dated August 9, 1962, exceptions to the said judgment to be hereafter assigned.

This 18th day of August, 1962.

McDERMOTT, CAMERON & HARRINGTON

By s/ GEORGE M. McDERMOTT
Attorneys for Petitioner

SERVICE:

A true copy of the foregoing Notice was on the 18th day of August, 1962, duly served by the undersigned on K. R. Hoyle, a member of the firm of Hoyle & Hoyle, Attorneys of Record for H. Aubrey Ford, Jr., by delivering the same to him in the City of Sanford, North Carolina.

This 18 day of August, 1962.

/s/D. F. HOLDER
Sheriff of Lee County
By /s/J. L. COLEY

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

vs.

APPEAL ENTRIES

BARBARA DALE FORD,
Defendant

BARBARA DALE FORD, objects and excepts to the Judgment rendered herein by his Honor Edward B. Clark, Judge Presiding over the August Term of the Lee County Superior Court dated August 9, 1962 and appeals therefrom to the Supreme Court of North Carolina, notice thereof having been duly served on Hoyle & Hoyle, Attorneys of record for H. Aubrey Ford, Jr., on August 18, 1962; appeal bond being hereby fixed in the sum of $100.00 and posted in the form of a cash deposit.

This 20th day of August, 1962.

s/E. M. UNDERWOOD
Clerk of Superior Court of Lee County

NORTH CAROLINA, Lee County

I, E. M. UNDERWOOD, Clerk of Superior Court of Lee County, North Carolina, do hereby certify that the foregoing annexed papers are true and complete copies of the records and Judicial proceeding of a Civil action, lately pending in the Superior Court of Lee County, under the name of "H.

Aubrey Ford, Jr., Plaintiff vs. Barbara Dale Ford, Defendant", which successively bore Summons Docket No. 6159, Civil Issue Docket No. 3262, and now bear Judgment Docket No. 12,409, the same being taken from and compared with the originals on file in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court, said Court being a Court of record with a seal, this 28th day of August, 1962.

s/ E. M. UNDERWOOD SEAL
Clerk of Superior Court

NORTH CAROLINA, Lee County

I, CLAWSON L. WILLIAMS, SR., Resident Judge of the Eleventh Judicial District of North Carolina, embracing the County of Lee, do hereby certify that E. M. UNDERWOOD, whose name is subscribed to the foregoing and annexed certificate is Clerk of the Superior Court of Lee County, North Carolina, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to said certificate is the seal of said Court and that the exemplification is authenticated in due form and by the proper officer and in his own handwriting, and in such a form and manner that it would be received in any Court of this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand at Sanford, Lee County, North Carolina, this 30th day of August, 1962.

s/ CLAWSON L. WILLIAMS, SR.
Resident Judge
Eleventh Judicial District of North Carolina

NORTH CAROLINA, Lee County

I, E. M. UNDERWOOD, Clerk of the Superior Court of Lee County, North Carolina, do hereby certify that CLAWSON L. WILLIAMS, SR., whose name is subscribed to the foregoing and annexed certificate is the Resident Judge of the Eleventh Judicial District including Lee County, duly elected and sworn, and that the signature of said Judge to the said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court, in Sanford, Lee County, North Carolina, this the 31st day of August, 1962.

s/E. M. UNDERWOOD (SEAL)
Clerk of Superior Court

In The Supreme Court

NORTH CAROLINA

IN THE MATTER OF H. AUBREY FORD, JR., VS. BARBARA DALE FORD

ORDER

This cause coming on to be heard and being heard before the undersigned Chief Justice of the Supreme Court of North Carolina, and it being made to appear to the undersigned, by petition and affidavit filed herein, that the petition for an order of supersedeas should be granted to the end that the execution and enforcement of the judgment of the Superior Court of Lee County entered in this cause on the 10th day of August, 1962, be stayed pending the appeal from said judgment and further judgment or order of this Court—and it further appearing that H. Aubrey Ford, Jr., should be required to abide by the terms of the Order of the Court of Common Pleas of Greenville County, Greenville, South Carolina, as directed by the December 22, 1961 Order of the Honorable Felix Frankfurter, Associate Justice of the United States Supreme Court, by returning the minor children named in the petition to the petitioner before the opening of the Schools in Greenville, South Carolina, on September 4, 1962.

NOW, THEREFORE, it is ordered that the enforcement and execution of the judgment of the Superior Court of Lee County entered in the cause styled in that Court "H. Aubrey Ford, Jr., Plaintiff, vs. Barbara Dale Ford, Defendant," be and the same is hereby suspended and stayed pending the appeal from said judgment now pending in this Court, and pending judgment or further orders of this Court.

And, it is further ordered that H. Aubrey Ford, Jr., return the minor childen named in the petition to the petitioner not later than 5:00 o'clock P.M., Sunday, the 2nd day of September, 1962.

This the 24th day of August, 1962.

/s/ EMERY B. DENNY
Chief Justice
North Carolina Supreme Court